U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: MAR 0 8 2013 OFFICE: TEXAS SERVICE CENTER FILE

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The petitioner filed a motion to reconsider, which the director dismissed. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a special education teacher for [redacted] in Maryland. She has taught at [redacted] Maryland, since 2005. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel as well as background documentation.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

In re New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner must establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on March 19, 2012. USCIS records show that [redacted] filed a petition, with an approved labor certification, seeking to classify the alien as a member of the professions under section 203(b)(3) of the Act. The director approved that petition on July 10, 2009; the approved petition has a priority date of September 29, 2008. There is no indication that [redacted] withdrew that petition or that the director revoked its approval; the approved petition remains in effect. For nationals of the Philippines, such as the petitioner, that immigrant classification is oversubscribed. The March 2013 Visa Bulletin shows a cutoff date of September 1, 2006. Because the petitioner's approved petition has a later priority date, she is not yet eligible to adjust status based on that approved petition.

The petition included a statement in which the petitioner described a successful and fulfilling career in special education. She did not, in this statement, directly address the eligibility requirements for

the national interest waiver. Rather, she acknowledged that she filed the petition as a means to avoid a temporary interruption in her ability to live and work in the United States. She stated:

> Having taught in USA for almost 7 years now has given me a mission in my life to continue my job of helping my students the best way I can based from [*sic*] my education, trainings [*sic*] and experience. And I can only do this if I am given the chance to continue my residency here in USA. I was sponsored by [*sic*] and currently I have an I140 with a priority date of Sept. 2008, but since has been debarred from continuing my sponsorship as per Department of Labor decision, then I have to find another route to continue my advocacy of applying my profession for the betterment of the students of

USCIS invoked the debarment provisions of section 212(n)(2)(C)(i) of the Act against owing to certain immigration violations by that employer. As a result, between March 16, 2012 to March 15, 2014, USCIS will not approve any employment-based immigrant or nonimmigrant petitions filed by This debarment means that is, temporarily, unable to file its own petition on the alien's behalf. (The debarment order does not affect the validity of the previously approved petition from 2008. It simply prevents the approval of new petitions during the prescribed period.) While oversubscription has delayed the petitioner's ability to adjust status based on her approved petition, and cannot file a stopgap nonimmigrant petition on her behalf, these factors are not sufficient cause for a national interest waiver; the petitioner still must demonstrate that the alien will serve the national interest to a substantially greater degree than do others in the same field. *Cf. NYSDOT*, 22 I&N Dec. at 218 n.5 (unavailability of labor certification does not warrant approval of the waiver).

Neither the Texas Service Center nor the AAO is responsible for the debarment, and those entities have no authority to override or modify it. The national interest waiver is not a means for aliens to override or avoid legal sanctions imposed on their intending employers.[2]

The petitioner submitted copies of various materials relating to her work, including certificates, evaluations, classwork and photographs. Similarly, several witness letters show that colleagues and administrators hold the petitioner in high regard. These materials demonstrate that the petitioner is a successful teacher, but they do not self-evidently set her apart from other competent and qualified teachers.

On June 26, 2012, the director issued a request for evidence. The director noted that the petitioner is the beneficiary of an approved immigrant petition filed by The director stated: "The

[1] The list of debarred employers is available online at http://www.dol.gov/whd/immigration/H1BDebarment.htm (printout added to record February 27, 2013).

[2] With respect to this particular alien's ability to work in the United States, the AAO notes that an educational staffing service, filed a nonimmigrant petition on the alien's behalf on September 28, 2012. The Director, Vermont Service Center, approved that petition. The alien, therefore, holds H-1B nonimmigrant status allowing her to work for until September 19, 2015, by which point the debarment order against will have expired and the visa number cutoff date will presumably have advanced closer, or past, the priority date of her approved immigrant petition.

petitioner must establish that the beneficiary has a past record of specific prior achievement with some degree of influence on the field as a whole. The beneficiary's previous influence on the field as a whole must justify projections of future benefit to the national interest."

In response, counsel asserted that it is unrealistic to expect a special education teacher's work to produce a benefit that is national in scope. This observation is consistent with *NYSDOT*, which contains the following passage: "While education is in the national interest, the impact of a single schoolteacher in one elementary school would not be in the national interest for purposes of waiving the job offer requirement of section 203(b)(2)(B) of the Act." *Id.* at 217 n.3. Counsel, however, contends that "the proposed employment [is] national in scope" because "Acts of Congress and other pronouncements" have stressed the importance of educators and education. In this way, counsel conflates the national importance of "education" as a concept, or "educators" as a class, with the impact of one teacher. The undeniable importance of education as a whole does not imply that Congress has indirectly exempted teachers such as the petitioner from the job offer requirement.

Counsel claimed that the labor certification process poses a "dilemma" for the petitioner because she possesses qualifications above the bare minimum required for the job she seeks, and therefore "the United States Department of Labor would . . . most likely recommend denial of the application" for labor certification. The Department of Labor, however, has already approved a labor certification for the petitioner, and therefore counsel's speculation contradicts documented facts.

Counsel stated that another [redacted] teacher received a national interest waiver, and asked that the present petition "be treated in the same light." While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Furthermore, counsel has furnished no evidence to establish that the facts of the instant petition are similar to those in the unpublished decision. Without such evidence, the assertion that both cases merit the same outcome is unwarranted.

The director denied the petition on November 7, 2012, stating that the petitioner had not established a past record of achievement and influence that would justify the special benefit of the national interest waiver. The director stated:

> Counsel's assertions regarding the overall importance of the beneficiary's area of expertise cannot suffice to establish eligibility for a national interest waiver. The issue in this case is not whether teaching education [*sic*] is in the national interest, but whether the beneficiary, to a greater extent than U.S. workers having the same qualifications, plays a significant role in the field.

On appeal, counsel repeatedly refers to presidential speeches and federal initiatives such as the No Child Left Behind Act (NCLBA), stating that "Congress has spelled out the national interest with respect to public elementary and secondary school education" through such legislation. Counsel, however, identifies no special legislative or regulatory provisions that exempt school teachers from

NYSDOT or reduce its impact on them. Counsel notes that Congress passed the NCLBA "three years after NYSDOT was designated as a precedent decision."

The assertion that the NCLBA is tantamount to a retraction or modification of *NYSDOT* is not persuasive; the NCLBA did not amend section 203(b)(2) of the Act. In contrast, section 5 of the Nursing Relief for Disadvantaged Areas Act of 1999, Pub.L. 106-95 (November 12, 1999), specifically amended the Immigration and Nationality Act by adding section 203(b)(2)(B)(ii) to create special waiver provisions for certain physicians. Because Congress not only can amend the Act to clarify the waiver provisions, but has in fact done so in direct response to *NYSDOT*, counsel has not made a persuasive claim that NCLBA indirectly implies a similar legislative change.

Counsel devotes some attention to the petitioner's individual qualifications, but most of the appellate brief consists of variations on the claim that well-qualified teachers, as a group, should be exempt from the job offer/labor certification requirement, and that *NYSDOT* should not apply to them. Precedent decisions are binding on all USCIS employees in the administration of the Act. *See* 8 C.F.R. § 103.3(c). Counsel persuasively cites no statute, regulation or case law that would require or permit USCIS to disregard *NYSDOT* as it applies to school teachers.

As is clear from a plain reading of the statute, engaging in a profession (such as teaching) does not presumptively exempt such professionals from the requirement of a job offer based on national interest. Congress has not established any blanket waiver for teachers. Eligibility for the waiver rests not on the basis of the overall importance of a given profession, but rather on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.